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Supreme Court of the United States.

October Term, 1972.

No.

BRUCE R. DESMARAIS et al., Petitioners,
v.
WACHUSETT REGIONAL SCHOOL DISTRICT
et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT.

The petitioners, Bruce R. Desmarais and Robert F. Desmarais, pray for a writ of certiorari to review a decision of the Massachusetts Appeals Court.

Opinions Below.

The decision of the Appeals Court from which review is being sought is Bruce R. Desmarais et al. v. Wachusett Regional School District et al. A copy of said decision is appended hereto as Appendix A. That decision affirmed the orders of the Massachusetts Superior Court in an unreported decision of that Court which sustained defendants' demurrers to plaintiffs' declaration without leave to amend. A copy of that decision is appended hereto as Appendix B.

In another unreported decision, the Supreme Judicial Court of Massachusetts denied petitioners' application for further appellate review of the Appeals Court decision. A copy of that decision is appended hereto as Appendix C.

Jurisdiction.

The date of the denial of petitioners' application for further appellate review by the Supreme Judicial Court was May 1, 1973 (App. C). This petition has been filed within 90 days of said date. Jurisdiction is based upon 28 U.S.C. § 1257(3).

Questions Presented.

The Superior Court sustained demurrers to plaintiffs' declaration, and the Appeals Court affirmed the orders sustaining the demurrers on the grounds that the individual defendant in the action was a public school teacher, and, as such, he was a public officer, and that a public officer was liable in tort for malfeasance, and not for nonfeasance; that the acts complained of in the declaration at worst amounted to nonfeasance, as opposed to malfeasance. The demurrers of the Wachusett Regional School District were sustained on the ground of the doctrine of sovereign immunity.

The actions below present the following federal constitutional questions:

1. Does denial by the Massachusetts Court of a plaintiff's right to a trial by jury in an action of tort by a public school student against a public school teacher amount to a denial of due process of law as guaranteed by Amendment XIV to the United States Constitution?

2. Does the Massachusetts case law which states that a public school student may recover damages in a tort action

from a public school teacher only upon a showing of misfeasance (as opposed to nonfeasance) amount to a denial of equal protection of the law as guaranteed by Amendment XIV to the United States Constitution?

3. Is the doctrine of "governmental immunity" from tort liability violative of said Amendment XIV in the area of tort liability on the part of a public school system to a student within that system?

Note — for the Massachusetts case law on the subject, reference is made to *Desmarais* v. *Wachusett Regional School District,* Mass. Adv. Sh. (1971) 1763. This was an earlier case involving the same parties and arising out of the same set of circumstances. A copy of this decision is appended as Appendix A-1.

Constitutional Provisions Involved.

United States Constitution, Amendment XIV: Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of Facts.

Inasmuch as the case arises upon sustaining of demurrers, for the purposes of argument and appeal, the facts, as alleged in plaintiffs' declaration, are uncontroverted, and are summarily stated:

THE PLAINTIFFS AND THEIR COMPLAINT, AND THE DEFENDANTS.

At the time the cause of action arose, the plaintiff Bruce R. Desmarais was a 16-year-old student at the Wachusett Regional High School, a public school under the control of the defendant Wachusett Regional School District, a public body corporate and politic. The defendant David H. Byron was a chemistry teacher at that school.

Toward the end of the school year, Byron ordered his class, in which the young plaintiff was a member, to conduct a certain experiment involving the use of volatile and explosive chemicals. This defendant knew that if the chemicals exploded there would be a serious risk of injury to the students. The minor plaintiff conducted the experiment, as ordered. An explosion occurred and the minor plaintiff suffered irreparable injury causing total and permanent loss of sight to one of his eyes.

The plaintiff Robert F. Desmarais brought suit for consequential damages for medical expenses incurred for his minor son.

Defendant Wachusett Regional School District was joined under the doctrine of "respondeat superior."

DECISION BELOW.

The Courts below sustained defendants' demurrers and thereby denied plaintiffs a jury trial on the factual issues on the grounds set forth under "Questions Presented," above. Although the federal constitutional issues were raised in the briefs and arguments before the Superior Court and Appeals Court, and in the application for further review filed with the Supreme Judicial Court, none of those Courts saw fit to meet those issues, and, in effect, decided the federal constitutional questions presented by plaintiffs adversely to them, *i.e.*, that this rule did not violate plain-

tiffs' constitutional rights. Appended hereto as appendices D, E and F are salient portions of plaintiffs' briefs and application for further review indicating the manner in which the federal constitutional issues were raised in the State Courts.

Reasons for Granting the Writ.

The petitioners below could find no case of this Court which deals precisely with the narrow questions presented. Hence, plaintiffs can only herewith present an argument based upon a history and analysis of cases dealing with due process and equal protection, and cull therefrom those cases deemed most closely analogous in law and in fact to the plaintiffs' case.

Supreme Court Treatment of Sovereign Immunity.

The Court has exhibited great reluctance to disturb state law or policy with regard to governmental immunity. *Beers* v. *Arkansas*, 20 How. 527 (1857), a pre-Fourteenth Amendment case, is the progenitor of the current approach. *Beers* held, at page 529, that since permission by a sovereign to be sued "is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued." Fifty years later, Justice Holmes stated "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (1907). The controlling case is *Palmer* v. *Ohio*, 248 U.S. 32 (1918), which addressed itself to the issue of an individual's right to sue the state vis-à-vis the Constitution:

> "The right of individuals to sue a State, in either a federal or state court, *cannot* be derived from the Constitution or the laws of the United States. It can come only from the consent of the State. . . . Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted [referring to Ohio Constitution], and this is a question of local state law, as to which the decision of the State Supreme Court is controlling with this court, *no federal right being involved.*" *Ibid.*, at 34. (Emphasis supplied.)

The validity of *Palmer* was reaffirmed as recently as 1964 in *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), where the Court cited *Palmer* in *allowing* suit against a state agency on the theory of implied consent resulting from certain agency activity under a federal statute. While the Court upheld the petitioner's claim to his day in court, it did so within the confines of the *Palmer* consent theory.

Thus it appears that the Court discerns no impairment of federal rights in cases where suits against the *State* are defended on ground of governmental immunity.

The issue in the instant case, however, is distinguishable in that it is clear that neither defendant performs any purely governmental function and, therefore, should not have the benefit of the State's immunity. Moreover, there is considerable doubt, which arises in the rational mind, as to the soundness of the Massachusetts Supreme Judicial Court's position that no federal right is involved, especially in light of more recent cases which have expanded the dimensions of equal protection and due process.

Access to the Courts and Due Process.

Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in

American life, subject only to the caveat that formal judicial process, if restored to, is paramount. Thus, this Court has seldom been asked to view access to the courts as an element of due process.

> "The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain." *Boddie* v. *Connecticut,* 401 U.S. 371, 375-376 (1971) (per Harlan, J.).

Boddie involved a challenge to Connecticut's fee requirement as a prerequisite to the filing of a divorce action. The Court held that due process of law prohibited a state from denying, solely because of inability to pay court fees, access to its courts to indigents. In so holding, it relied on two essential elements of due process jurisprudence.

(a) "[d]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard" (at 377) and the Constitution does require "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), "for [a] hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950).

(b) A statute or a rule may be constitutionally infirm when it operates to deprive an individual of a protected right even though its general validity as a measure enacted in the legitimate exercise of state power is beyond question. *Boddie,* at 379.

The Court in *Boddie* was quite specific, however, that the due process clause did *not* require open access for *all* in-

dividuals to the courts. It established two due process criteria for open access to the courts.

(a) That the judicial mechanism be the exclusive means for resolving the dispute; and

(b) That the dispute involve some fundamental subject matter.

Hence, *Boddie* presents three important questions with regard to due process:

(a) Is the judicial process the exclusive means of resolving a private dispute?

(b) Does the dispute involve some fundamental subject matter?

(c) Is there present a countervailing state interest of overriding significance sufficient to deny open access to the courts?

A recent case, *United States* v. *Kras*, 409 U.S. 434 (1973), held, on these grounds, that the requirement of bankruptcy filing fees were not violative of the Fifth Amendment, due process or equal protection clauses. It saw other avenues of resolution for the bankrupt (*e.g.*, creditor arrangements) and "no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy." (At 445.)

As applied to the instant case, there seems little doubt that a full trial on the merits represents the exclusive means of dispute resolution. There is doubt, however, on two grounds:

(a) as to whether the appellant's right of action is "fundamental" within the confines of *Boddie* and *Kras* and other due process cases;

(b) as to whether state immunity is of overriding significance. This second point is clearly one of equal protection consideration and will be discussed *post*.

As noted in Justice Harlan's opinion in *Boddie*, access to the courts as a due process question plays a minor role

in the Court's history. Of the existing case law raising the issue, most have dealt with state statutes eliminating certain causes of action. With unanimity, they speak of "vested rights of action."

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away." *Pritchard* v. *Norton*, 106 U.S. 124, 132 (1882).

Jones v. *Union Guano Co., Inc.*, 264 U.S. 171 (1924), held that a statute which required certain chemical analysis of fertilizer as a precondition to a suit for damages (on breach of merchantability) was not repugnant to due process of law under the Fourteenth Amendment:

> "The Fourteenth Amendment does not prevent a State from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object." *Ibid.*, at 181.

Gibbes v. *Zimmerman*, 290 U.S. 326 (1933), is another example of the Court's laissez-faire attitude with respect to State impairment of judicial redress. It recognized the "property" characteristics of a vested right of action (citing *Pritchard*) and noted:

> "all that is guaranteed by the Fourteenth Amendment is the preservation of his [the appellant's] substantial right to redress by some effective procedure." *Ibid.*, at 332.

Rochin v. *California*, 342 U.S. 165 (1952), proposes a disinterested view by the Court into questions of due process. It speaks of due process of law as a summarized constitutional guaranty of respect for those personal immunities which are so rooted in the traditions and conscience of the nation as to be ranked as fundamental or implicit in the concept of ordered liberty. Moreover, it holds that due process of law requires in each case

> ". . . an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . [and] on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Ibid.*, at 172.

In *Truax* v. *Corrigan*, 257 U.S. 312 (1921), a case where the Supreme Court reversed the lower court's sustaining demurrers pleaded under a statute relating to labor disputes, in which injunctive relief was sought, the Court (per Taft) said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment *only after trial*, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California*, 110 U.S. 516, 535." *Ibid.*, at 332. (Emphasis added.)

Thus we may logically conclude that while the Court does recognize the fundamental nature of a right of action, the

recognition has been weighed against State interest in restricting access to the Court. This "balancing of the equities" is largely a problem of equal protection.

Access to the Courts and Equal Protection of the Law.

Where the State Common Law creates two classes of litigants, those who have a cause of action because injured by a private tortfeasor and those whose cause of action is barred by governmental immunity, does the application of this immunity constitute a denial of equal protection or due process of law under the Constitution?

In light of *Palmer,* which appears to be the controlling law on governmental immunity, the question stated above would be answered in the negative. But, the facts of Desmarais can be differentiated from the *Palmer* situation. There may indeed be sufficient reason to protect the *State* from the claims of its citizens (disruption of the orderly flow of government, overly generous juries awarding verdicts to be paid from state treasuries, liability to suit discouraging availability of needed services, etc.) but the justification for this immunity becomes vague when *all* governmental officials and bodies are so immune. When lesser public officers are not required to answer for their act of negligence, the time has come for re-examination, as per *Rochin's* disinterested inquiry, of the reasonableness of the classification of litigants. In the last decade, many states have overturned the doctrine of sovereign immunity. But this erosion of the antiquated doctrine has been with unanimity, on the ground that immunity presents an inequitable situation. None of the cases decided in the state courts have dealt with the constitutional aspects presented.

Supreme Court Approach to Equal Protection.

In its most rudimentary state, equal protection of the law means that all individuals who are similarly situated

must be treated alike. If the law of the land (including common law) presents a situation where two or more classes of individuals are not similarly treated, then the Court asks if the classifications are reasonably related to a legitimate state objective. In answering this inquiry, the Court has applied varying tests. Is there a rational basis for the classification? Is there substantial justification? Is there a compelling state interest requiring the different treatment?

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. . . . [Legislative] classifications will be set aside only if no grounds can be conceived to justify them." *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 809 (1969).
>
> "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940) (per Frankfurter, J.).
>
> "[A] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

McDonald, Tigner and *Royster,* represent the older approach by the Court. In more recent cases, however, wherein fundamental rights were denied as a result of classification, the Court has required that there be not only a rational basis but also a *compelling state interest.* Thus, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), struck down several state residency requirements for welfare benefits as invidious classifications prohibited under Fourteenth Amendment equal protection. *Douglas* v. *California,* 372 U.S. 353 (1963), held that economic classification which permits criminal appeals by the rich and denies them to the poor (unable to afford counsel) is violative of the equal protection clause.

Gomillion v. *Lightfoot,* 364 U.S. 339 (1960)—"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Ibid.,* at 347. (Striking down "Georgia" reapportionment scheme.) *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U.S. 73 (1968)—that a Louisiana wrongful death statute as construed to bar recovery to the parent of an illegitimate child violates equal protection, there being no rational basis for the distinction. *Levy* v. *Louisiana,* 391 U.S. 68 (1968)—same Louisiana statute as in *Glona*: "[W]e have been extremely sensitive when it comes to basic civil rights (*Skinner* v. *Oklahoma* [316 U.S. 535], at 541; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 669-670) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Ibid.,* at 71. *Griffin* v. *Illinois,* 351 U.S. 12 (1956)—right of indigent convicted defendants to have free transcript for appellate review. *Anders* v. *California,* 386 U.S. 738 (1967)—indigents' right to counsel on appellate review.

In all of the above cases, the Court saw some fundamental right being impaired. Justice Douglas captured the approach in *Harper, supra,* at 670:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."

This careful scrutiny has long been evident in cases where a law, nondiscriminatory on its face, but discretionary in its application, has been challenged:

(a) *Guinn* v. *United States,* 238 U.S. 347 (1915)—striking down constitutional state amendment (grandfather clause), apparently equal-handed (*i.e.,* applying to all potential voters), but discriminatory against blacks in practice.

(b) *Lane* v. *Wilson,* 307 U.S. 268 (1939)—statute enacted after *Guinn* also found to be discriminatory in practice.

(c) *Reynolds* v. *Sims,* 377 U.S. 533 (1964)—invalidating "Georgia" apportionment plan: "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' " *Ibid.,* at 563.

(d) *Reed* v. *Reed,* 404 U.S. 71—(1971)—Idaho probate code provisions giving men preference over women when persons of the same entitlement class apply for appointment as administrator is based solely on a discrimination prohibited by equal protection clause.

Equal Protection Considerations in Desmarais.

The petitioners suggest that the thrust and trend of the more recent cases dealing with equal protection is toward resolving doubts as to whether or not a given law is discriminatory in favor of the individual as opposed to the

State. The petitioners urge that the facts in the Desmarais case fall into the pattern of these more recent cases and that this case should therefore be treated in the same fashion.

If we construe the right to sue for personal injuries allegedly caused by a public official's negligence as *fundamental,* then are the present disparities (between victim of public and private tortfeasors) justified by a compelling state interest (*Shapiro*) or by countervailing state interests of overriding significance (*Boddie*)? Can it be said as a matter of law that the reasons proffered for the sovereign immunity rule as applied to this case are capricious or arbitrary or that they bear no reasonable relation to a legitimate state objective? The petitioners urge that the first question should be answered in the negative and the second in the affirmative.

In concluding, a quotation from *Truax, supra,* at 333, is appropriate:

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Petitioners urge that granting immunity from that liability to a limited class (public school teachers) has the effect of depriving another limited class (public school students) of a property right. Hence, *Truax* should be applied to this case.

Plaintiffs respectfully suggest that the cases listed below are those most closely analogous in fact or law in the instant case, and that if the trend and thrust of those cases

is followed, plaintiffs should prevail, and the Massachusetts case law complained of should be declared unconstitutional:

a. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).
b. *Pritchard* v. *Norton*, 106 U.S. 124 (1882).
c. *Rochin* v. *California*, 342 U.S. 165 (1952).
d. *Truax* v. *Corrigan*, 257 U.S. 312 (1921).
e. *Hurtado* v. *California*, 110 U.S. 516 (1884).
f. *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969).
g. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).
h. *Douglas* v. *California*, 372 U.S. 353 (1963).
i. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).
j. *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968).
k. *Levy* v. *Louisiana*, 391 U.S. 68 (1968).
l. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).
m. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).
n. *Cooper* v. *Aaron*, 78 S. Ct. 1401 (1964).
o. *Griffin* v. *Illinois*, 351 U.S. 12 (1956).
p. *Guinn* v. *United States*, 238 U.S. 347 (1915).
q. *Lane* v. *Wilson*, 307 U.S. 268 (1939).
r. *Reynolds* v. *Sims*, 377 U.S. 533 (1964).
s. *Reed* v. *Reed*, 404 U.S. 71 (1971).
t. *Baker* v. *Carr*, 369 U.S. 186 (1962).
u. *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).
v. *Barbier* v. *Connolly*, 113 U.S. 27 (1885).

Respectfully submitted,
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Appendix A.

W. 72-53-L Appeals Court

BRUCE R. DESMARAIS & another vs. WACHUSETT REGIONAL SCHOOL DISTRICT & another.

(Rescript Opinion)

This is an action of tort brought by Bruce R. Desmarais, a minor, for personal injuries, and by his father, Robert R. Desmarais, for consequential damages against the defendants, David H. Byron, a teacher in the classroom where the minor Desmarais sustained his injuries, and the Wachusett Regional School District. Both defendants' demurrers were sustained and the plaintiffs' appeals from the orders bring this case before us. This is the second action by the plaintiffs against these defendants for the same injury arising out of the same accident. In the earlier action, an order sustaining the defendants' demurrers was affirmed by the Supreme Judicial Court. Desmarais v. Wachusett Regional School District, Mass. [a]. Following that rescript, the plaintiffs commenced the instant action. A careful examination of the present counts of the declaration discloses no significant difference from those filed in the previous case. Therefore we hold that the court below was correct in sustaining the demurrers.

Orders sustaining demurrers affirmed.

Judgments for defendants.

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[a] Mass. Adv. Sh. (1971) 1763.

Appendix A - 1.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 462 of Acts of 1935

WRIGHT & POTTER PRINTING COMPANY, 32 DERNE STREET, BOSTON

BRUCE R. DESMARAIS & another vs. WACHUSETT REGIONAL SCHOOL DISTRICT & another.

Worcester. November 3, 1971. — December 9, 1971.

Present: TAURO, C.J., CUTTER, REARDON, BRAUCHER, & HENNESSEY, JJ.

School and School Committee. Regional School District. Public Officer. Negligence. Public school teacher, Public officer. *Municipal Corporations,* Liability for tort, Officers and agents.

Action heard in the Superior Court by *Lappin,* J., on demurrers.

TAURO, C.J. This is an action of tort brought by Bruce R. Desmarais, a minor, for personal injuries, and by his father Robert R. Desmarais for consequential damages against the defendant Wachusett Regional School District and the defendant David H. Byron, the teacher in the classroom where the minor Desmarais sustained his injuries. The plaintiffs are here on their appeals from orders sustaining the defendants' demurrers to the plaintiffs' amended declaration.

In essence the amended declaration alleged: (1) that contrary to the provisions of G. L. c. 71, § 55C, the defendant Byron "engaged in a continuing course of misfeasant conduct in that he led his pupils to believe that he would not discipline or punish them in any way if they failed to wear safety glasses during the conduct of dangerous experiments" and (2) that the defendant Byron "negligently and carelessly failed to use due care in his supervision

of the [minor] plaintiff . . . in that he . . . allowed the [minor] plaintiff to conduct an experiment at his direction which involved the use of volatile and explosive chemicals without wearing safety glasses." The defendant school district was alleged to be responsible for the actions of Byron whom it employed. It is further alleged that as a result the plaintiff Bruce R. Desmarais was not wearing safety glasses when an explosion occurred causing the permanent loss of sight in one eye.

The defendants' demurrers are based on the following grounds: (1) the plaintiffs fail to state a cause of action; (2) the defendant Byron, a schoolteacher, was a public officer with limited duties and powers and was not liable for the failure to perform the duties of his office; (3) the defendant school district was protected from liability under the doctrine of governmental immunity.

The plaintiffs argue that Byron is not entitled to the status of a public officer, and that, even if this contention is rejected, his conduct constituted misfeasance which made him liable to the plaintiffs. The plaintiffs further argue that governmental immunity is not a defence by reason of G. L. c. 41, § 100C, as appearing in St. 1964, c. 513, which provided for the indemnification of teachers.

The pertinent part of G. L. c. 71, § 55C, as appearing in St. 1966, c. 21, is as follows: "Each teacher and pupil of any school . . . shall, while attending school classes in . . . laboratories in which caustic or explosive chemicals . . . are used . . . exposure to which may be a source of danger to the eyes, wear an industrial quality eye protective device." Prior to its amendment, the statute provided as follows: "The school committee of each city or town shall require each pupil and teacher in a public school to wear . . . eye protective devices . . . ." The amendment thus removed from the school committee the responsibility of enforcing compliance with the statute and did not place a similar responsibility on anyone else except those who might be exposed to possible harm.

The general rule is that "public officers engaged wholly in the performance of public duties are liable only for their

own acts of misfeasance in connection with ministerial matters." *Fulgoni* v. *Johnston*, 302 Mass. 421, 423. *Moynihan* v. *Todd*, 188 Mass. 301, 303. The defendant Byron as a teacher in a public school is governed by the same standard of tort liability as a public officer. *Fulgoni* v. *Johnston*, *supra*, at 423. Even assuming that Byron was bound to require the wearing of safety glasses, he cannot be held guilty of misfeasance for mere inaction. "[N]egligence which amounts to nothing more than an omission or nonfeasance creates no liability. . . . [N]onfeasance is the omission of an act which a person ought to do, misfeasance is the improper doing of an act which a person might lawfully do." *Trum* v. *Paxton*, 329 Mass. 434, 438.

The defendant Wachusett Regional School District has the same protection from liability as a town under the doctrine of governmental immunity since a regional school district by statute has been placed in the same position as a town for the purpose of lawsuits. G. L. c. 71, § 16 (b). It is settled law in this Commonwealth that a municipality is not liable for the acts of public officers acting in the discharge of public duties imposed upon them. *Molinari* v. *Boston*, 333 Mass. 394, 395. A municipality is not liable for negligent or tortious acts in the conduct of its schools. *Hill* v. *Boston*, 122 Mass. 344, 345. *Bolster* v. *Lawrence*, 225 Mass. 387, 389. Moreover, a municipality is not liable for the misfeasance of the public officers "performing duties strictly public" since "the doctrine *respondeat superior* does not apply to the servants of one who is acting only as a representative of the government, for the benefit of the public." *Moynihan* v. *Todd*, *supra*, at 304. We reject the plaintiffs' contention that by enacting G. L. c. 41, § 100C, and G. L. c. 40, § 5 (1), the Legislature "waived" governmental immunity.[1] See *Kosiba* v. *Syracuse*, 260 App. Div.

[1] In effect, G. L. c. 41, § 100C, as appearing in St. 1964, c. 513, provided that a city, town or regional school district should indemnify a teacher for expenses or damages sustained by him by reason of an action or claim against him arising out of his negligence or other act of his resulting in accidental bodily injury to any person. General Laws c. 40, § 5 (1), provides that a town may appropriate money for insurance which provides indemnity or protection as prescribed by G. L. c. 41, § 100C.

(N. Y.) 557, reh. den. 261 App. Div. (N. Y.) 884, modified on other grounds 287 N. Y. 283.

There was no error in the orders of the Superior Court judge sustaining the defendants' demurrers.

Orders sustaining demurrers affirmed.

Gerald F. Madans for the plaintiffs.

T. Philip Loader for the defendants.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT.

WORCESTER, ss. 184605

BRUCE R. DESMARAIS and
ROBERT F. DESMARAIS

vs.

WACHUSETT REGIONAL SCHOOL DISTRICT
and DAVID H. BYRON

Plaintiff's Declaration

COUNT I: (Bruce R. Desmarais vs. David H. Byron, for personal injuries)

Now comes the plaintiff and says that on or about June 10, 1966, the defendant David H. Byron was employed as a chemistry teacher at the Wachusett Regional High School, a public school in Holden, Massachusetts, by the Wachusett Regional School District, a body corporate and politic; that he had been so employed by said District from the beginning of the school year in September, 1965, and prior thereto; that the plaintiff was a pupil in one of the defendant's chemistry classes during the school year which began in September of 1965, to and including June 10, 1966; that during said school year, the defendant from time to time, as was his right, ordered his pupils, including the plaintiff,

to conduct and carry out certain chemical experiments; that the defendant knew, or should have known, that some of the experiments would involve the mixture of certain chemicals which either separately or as mixed were volatile or explosive; that the use of such chemicals, whether properly or improperly mixed, might lead to an explosion; that if such an explosion should occur, there would be a danger of injury to the pupils conducting the experiment, particularly to their faces and eyes; that as a teacher he had the duty and the right to properly conduct chemistry classes at the times, and to the classes and pupils that were assigned to him by the School Administration; that during the school year 1965-1966 the plaintiff was a pupil in one of the defendant's chemistry classes, having been so assigned by the Administration; that during that school year, the plaintiff was aged 17, and that the other pupils in the same chemistry class, approximately 25 in number, were generally in the same tender, immature, unsophisticated relatively uneducated age bracket as the plaintiff; that the pupils in said class, including the plaintiff, had no choice as to their teacher, but were instead ordered to the defendant's class by the School Administration; that while in such class, they were subject to his custody, control and supervision; that the defendant, while any particular class was in his classroom, had the right and the duty to properly teach, supervise, control and discipline the members of the class, including the plaintiff; that whereas he had the duty and obligation to teach said pupils chemistry, the specific manner and means in which he conducted his courses, subject to school rules and regulations, were within his sole proper discretion and control; that during said school year the defendant was aware of the fact that there was in force and

effect a statute directing that during the conduct of any experiments wherein volatile or explosive chemicals were to be used, pupils and teachers were to wear safety glasses in order to avoid possible injuries to the eyes; that separate and apart from the statute, the defendant knew, or should have known, that if such experiments were to be ordered by him, in order to protect the pupils who were under his charge, direction and control, without any choice of their own, and who were bound to follow his instructions while in his classroom, should have made certain as part of his duties, that each and every one of such pupils, including the plaintiff, wore safety glasses during any potentially dangerous experiment; that during the school year in issue, the defendant, as was his right and duty, ordered the pupils to conduct various experiments which involved the use of volatile or explosive chemicals; that the defendant, prior to ordering the conduct of such experiments sometimes announced, as was his duty, that the pupils should wear the safety glasses which had been furnished and provided by the School Administration; that during the course of said school year the defendant learned that some of the pupils, including the plaintiff, did not always use safety glasses, when they should have, and that they would either not use them at all, or use them only a portion of the time; that on or about June 10, 1966, toward the end of the school year, the defendant, even though he realized and knew that some of the pupils, including the plaintiff, might not wear safety glasses, ordered his pupils, including the plaintiff, to conduct an experiment involving the use of especially volative or explosive chemicals, and he knew or should have known, that the use of said chemicals involved an especially great risk of an explosion, which explosion could cause a serious injury to the eye or eyes of some of the pupils; that on the date in

question the plaintiff failed to wear safety glasses, while he was in a classroom which he was not in by his own choice, and while under the supervision and control of the defendant, dutifully conducted the experiment as ordered by the defendant; that during the conduct of said experiment, the chemicals exploded, through no fault of the plaintiff, the chemicals entered one of his eyes and caused permanent loss of sight in that eye and also caused the plaintiff to endure hospitalization, medical treatment, excrutiating pain and suffering, both mental and physical, which such pain suffering, and medical treatment have persisted from the date of the incident to the date of this declaration, and will probably continue for the rest of the plaintiff's life; that whereas the defendant had the right to conduct his classes in any way he deemed correct, in his reasonable discretion, he had the duty to conduct them properly, bearing in mind that he had the custody, control and supervision of his pupils while in his classroom, through no choice of their own, and he had the particular duty to use reasonable care to see to the safety of such pupils from physical harm while under his care and supervision, to the extent which he could; that also bearing in mind that the experiment in question was particularly dangerous, and bearing in mind that it was ordered close to the end of the school year in question, and bearing in mind that he knew or should have known by that time that some of his pupils, including the plaintiff, would probably fail to use safety glasses, and bearing in mind their tender, immature, unsophisticated relatively uneducated age bracket, and bearing in mind that this fact would greatly increase the danger of serious eye injury to the pupils, including the plaintiff, who were then and there under his custody, control and

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supervision, the defendant nevertheless improperly ordered them to conduct the experiment; that under all of these circumstances, the positive act of the defendant in ordering the particular experiment at the particular time was an improper doing of an act (conducting a class) which the defendant might lawfully do, or, misfeasance; that as the result of the defendant's misfeasance, or as the result of his improper doing of the act of ordering the experiment, which order the plaintiff was bound to follow, the plaintiff suffered the injuries hereinbefore referred to, and therefore claims damages from the defendant in the amount alleged in his writ.

COUNT II: (Robert F. Desmarais vs. David H. Byron, for consequential damages)

Now comes the plaintiff, Robert F. Desmarais, and says that he is the father of Bruce R. Desmarais and was responsible for his medical expenses up to and including July 29, 1970, at which time, Bruce R. Desmarais became twenty-one years old; that the defendant David H. Byron, was employed as a chemistry teacher at the Wachusett Regional High School, a public school in Holden, Massachusetts, by the Wachusett Regional School District, a body corporate and politic; that he had been so employed by said District from the beginning of the school year in September, 1965, and prior thereto; that the plaintiff was a pupil in one of the defendant's chemistry classes during the school year which began in September of 1965, to and including June 10, 1966; that during

said school year, the defendant from time to time, as was his right, ordered his pupils, including the plaintiff, Bruce R. Desmarais, to conduct and carry out certain chemical experiments; that the defendant knew, or should have known, that some of the experiments would involve the mixture of certain chemicals which either separately or as mixed were volatile or explosive; that the use of such chemicals, whether properly or improperly mixed, might lead to an explosion; that if such explosion should occur, there would be a danger of injury to the pupils conducting the experiment, particularly to their faces and eyes; that as a teacher he had the duty and the right to properly conduct chemistry classes at the times, and to the classes and pupils that were assigned to him by the School Administration; that during the school year 1965-1966 the plaintiff Bruce R. Desmarais was a pupil in one of the defendant's chemistry classes, having been so assigned by the Administration; that during that school year, the plaintiff Bruce R. Desmarais was aged 17, and that the other pupils in the same chemistry class, approximately 25 in number, were generally in the same tender, immature, unsophisticated relatively uneducated age bracket as the plaintiff, Bruce R. Desmarais; that the pupils in said class, including the plaintiff, Bruce R. Desmarais, had no choice as to their teacher, but were instead ordered to the defendant's class by the School Administration; that while in such class, they were subject to his custody, control and supervision; that the defendant, while any particular class was in his classroom, had the right and the duty to properly teach, supervise, control and discipline the members of the class, including the plaintiff, Bruce R. Desmarais; that whereas he had the duty and obligation to teach said pupils chemistry, the specific manner

and means in which he conducted his courses, subject to school rules and regulations, were within his sole proper discretion and control; that during said school year the defendant was aware of the fact that there was in force and effect a statute directing that during the conduct of any experiments wherein volatile or explosive chemicals were to be used, pupils and teachers were to wear safety glasses in order to avoid possible injuries to the eyes; that separate and apart from the statute, the defendant knew, or should have known, that if such experiments were to be ordered by him, in order to protect the pupils who were under his charge, direction and control, without any choice of their own, and who were bound to follow his instructions while in his classroom, should have made certain, as part of his duties, that each and every one of such pupils, including the plaintiff, Bruce R. Desmarais, wore safety glasses during any potentially dangerous experiment; that during the school year in issue, the defendant, as was his right and duty, ordered the pupils to conduct various experiments which involved the use of volatile or explosive chemicals; that the defendant, prior to ordering the conduct of such experiments sometimes announced, as was his duty, that the pupils should wear the safety glasses which had been furnished and provided by the School Administration; that during the course of said school year the defendant learned that some of the pupils, including the plaintiff, Bruce R. Desmarais, did not always use safety glasses when they should have, and that they would either not use them at all, or use them only a portion of the time; that on or about June 10, 1966, toward the end of the school year, the defendant, even though he realized and knew that some of his pupils, including the plaintiff, Bruce R. Desmarais, might not wear

safety glasses, ordered his pupils, including the plaintiff, to conduct an experiment involving the use of especially volative or explosive chemicals, and he knew, or should have known that the use of said chemicals involved an especially great risk of an explosion, which explosion could cause a serious injury to the eye or eyes of some of the pupils; that on the date in question the plaintiff Bruce R. Desmarais failed to wear safety glasses, while he was in a classroom which he was not in by his own choice, and while under the supervision and control of the defendant, dutifully conducted the experiment as ordered by the defendant; that during the conduct of said experiment, the chemicals exploded, through no fault of plaintiff Bruce R. Desmarais, the chemicals entered one of his eyes and caused permanent loss of sight in that eye and also caused the plaintiff Bruce R. Desmarais to endure hospitalization, medical treatment, excrutiating pain and suffering, both mental and physical, which such pain, suffering, and medical treatment have persisted from the date of the incident to date of this declaration, and will probably continue for the rest of the plaintiff, Bruce R. Desmarais' life; that whereas the defendant had the right to conduct his classes in any way he deemed correct, in his reasonable discretion, he had the duty to conduct them properly, bearing in mind that he had the custody, control and supervision of his pupils while in his classroom, through no choice of their own, and he had the particular duty to use reasonable care to see to the safety of such pupils from physical harm while under his care and supervision, to the extent which he could; that also bearing in mind that the experiment in question was particularly dangerous, and bearing in mind that it was ordered close to the end of the school year in question, and bearing in

mind that he knew or should have known by that time that some of his pupils, including the plaintiff Bruce R. Desmarais would probably fail to use safety glasses, and bearing in mind their tender, immature, unsophisticated relatively uneducated age bracket, and bearing in mind that this fact would greatly increase the danger of serious eye injury to the pupils, including the plaintiff, who were then and there under his custody, control and supervision, the defendant nevertheless improperly ordered them to conduct the experiment; that under all of these circumstances, the positive act of the defendant in ordering the particular experiment at the particular time was an improper doing of an act (conducting a class) which the defendant might lawfully do, or, misfeasance; or as the result of the defendant's misfeasance, or as the result of his improper doing of the act of ordering the experiment, which order the plaintiff was bound to follow, the plaintiff Bruce R. Desmarais suffered the injuries hereinbefore referred to, and therefore the plaintiff Robert F. Desmarais, became obligated to pay for his son substantial medical expenses, all to his great damage as alleged in this writ.

COUNT III: (Bruce R. Desmarais vs. Wachusett Regional School District, for personal injuries)

Now comes the plaintiff and says that the defendant is a body corporate and politic and was on or about June 10, 1966, charged with the duty of operating and maintaining Wachusett Regional High School, a public school in Holden, Massachusetts; that on or about said date and

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beginning in September, 1965, and prior thereto the defendant had in its employ as a chemistry teacher, David H. Byron and the defendant was responsible for his actions as such; that the plaintiff was a pupil in one of the said David H. Byron's chemistry classes during the school year which began in September of 1965, to and including June 10, 1966; that during said school year, David H. Byron from time to time, as was his right, ordered his pupils, including the plaintiff, to conduct and carry out certain chemical experiments; that David H. Byron knew, or should have known, that some of the experiments would involve the mixture of certain chemicals which either separately or as mixed were volatile or explosive; that the use of such chemicals, whether properly or improperly mixed, might lead to an explosion; that if such an explosion should occur, there would be a danger of injury to the pupils conducting the experiment, particularly to their faces and eyes; that as a teacher he had the duty and the right to properly conduct chemistry classes at the times, and to the classes and pupils that were assigned to him by the School Administration; that during the school year 1965-1966 the plaintiff was a pupil in one of David H. Byron's chemistry classes, having been so assigned by the Administration; that during that school year, the plaintiff was aged 17, and that the other pupils in the same chemistry class, approximately 25 in number, were generally in the same tender, immature, unsophisticated relatively uneducated age bracket as the plaintiff; that the pupils in said class, including the plaintiff, had no choice as to their teacher, but were instead ordered to the defendant David H. Byron's class by the School Administration; that while in such class, they were subject to his custody, control and supervision; that

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David H. Byron, while any particular class was in his classroom, had the right and the duty to properly teach, supervise, control and discipline the members of the class, including the plaintiff; that whereas he had the duty and obligation to teach said pupils chemistry, the specific manner and means in which he conducted his courses, subject to school rules and regulations, were within his sole proper discretion and control; that during said school year the defendant, David H. Byron, was aware of the fact that there was in force and effect a statute directing that during the conduct of any experiments wherein volatile or explosive chemicals were to be used, pupils and teachers were to wear safety glasses in order to avoid possible injuries to the eyes; that separate and apart from the statute, David H. Byron knew, or should have known, that if such experiments were to be ordered by him, in order to protect the pupils who were under his charge, direction and control, without any choice of their own, and who were bound to follow his instructions while in his classroom, should have made certain, as part of his duties, that each and every one of such pupils, including the plaintiff, wore safety glasses during any potentially dangerous experiment; that during the school year in issue, the defendant, David H. Byron, as was his right and duty, ordered the pupils to conduct various experiments which involved the use of volatile or explosive chemicals; that David H. Byron, prior to ordering the conduct of such experiments sometimes announced, as was his duty, that the pupils should wear the safety glasses which had been furnished and provided by the School Administration; that during the course of said school year the defendant, David H. Byron, learned that some of the pupils, including the plaintiff, did not always use safety

glasses, when they should have, and that they would either not use them at all, or use them only a portion of the time; that on or about June 10, 1966, toward the end of the school year, David H. Byron, even though he realized and knew that some of the pupils, including the plaintiff, might not wear safety glasses, ordered his pupils, including the plaintiff, to conduct an experiment involving the use of especially volative or explosive chemicals, and he knew, or should have known, that the use of said chemicals involved an especially great risk of an explosion, which explosion could cause a serious injury to the eye or eyes of some of the pupils; that on the date in question the plaintiff failed to wear safety glasses, while he was in a classroom which he was not in by his own choice, and while under the supervision and control of David H. Byron, dutifully conducted the experiment; as ordered by David H. Byron that during the conduct of said experiment, the chemicals exploded, and caused permanent loss of sight in that eye and also caused the through no fault of the plaintiff, the chemicals entered one of his eyes plaintiff to endure hospitalization, medical treatment, excrutiating pain and suffering, both mental and physical, which such pain, suffering and medical treatment have persisted from the date of the incident to the date of this declaration, and will probably continue for the rest of the plaintiff's life; that whereas David H. Byron had the right to conduct his classes in any way he deemed correct, in his reasonable discretion, he had the duty to conduct them properly, bearing in mind that he had the custody, control and supervision of his pupils while in his classroom, through no choice of their own, and he had the particular duty to use reasonable care to see to the safety of such pupils from physical harm

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while under his care and supervision, to the extent which he could; that also bearing in mind that the experiment in question was particularly dangerous, and bearing in mind that it was ordered close to the end of the school year in question, and bearing in mind that he knew or should have known by that time that some of his pupils, including the plaintiff would probably fail to use safety glasses, and bearing in mind their tender, immature, unsophisticated relatively uneducated age bracket, and bearing in mind that this fact would greatly increase the danger of serious eye injury to the pupils, including the plaintiff, who were then and there under his custody, control and supervision, the defendant, David H. Byron, nevertheless improperly ordered them to conduct the experiment; that under all of these circumstances, the positive act of David H. Byron in ordering the particular experiment at the particular time was an improper doing of an act (conducting a class) which David H. Byron might lawfully do, or, misfeasance; that as the result of David H. Byron's misfeasance; or as the result of his improper doing of the act of ordering the experiment, which order the plaintiff was bound to follow, the plaintiff suffered the injuries hereinbefore referred to, and therefore claims damages from the defendant in the amount alleged in his writ.

COUNT IV: Robert F. Desmarais vs. Wachusett Regional School District, for consequential damages)

Now comes the plaintiff, Robert F. Desmarais, and says that he is the father of Bruce R. Desmarais, and was responsible for his medical

expenses up to and including July 29, 1970, at which time Bruce R. Desmarais became twenty-one years old; that the defendant is a body corporate and politic and was on or about June 10, 1966, charged with the duty of operating and maintaining Wachusett Regional High School, a public school in Holden, Massachusetts; that on or about said date and beginning in September, 1965, and prior thereto the defendant had in its employ as a chemistry teacher, David H. Byron and the defendant was responsible for his actions as such; that the plaintiff Bruce R. Desmarais was a pupil in one of the said David H. Byron's chemistry classes during the school year which began in September of 1965, to and including June 10, 1966; during said school year, David H. Byron from time to time, as was his right, ordered his pupils, including the plaintiff Bruce R. Desmarais, to conduct and carry out certain chemical experiments; that David H. Byron knew, or should have known, that some of the experiments would involve the mixture of certain chemicals which either separately or as mixed were volatile or explosive; that the use of such chemicals, whether properly or improperly mixed, might lead to an explosion; that if such an explosion should occur, there would be a danger of injury to the pupils conducting the experiment, particularly to their face and eyes; that as a teacher he had the duty and the right to properly conduct chemistry classes at the times, and to the classes and pupils that were assigned to him by the School Administration; that during the school year 1965-1966 the plaintiff Bruce R. Desmarais was a pupil in one of David H. Byron's chemistry classes, having been so assigned by the Administration; that during that school year, the plaintiff Bruce R. Desmarais was aged 17, and that the other pupils in the same chemistry

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class, approximately 25 in number, were generally in the same tender, immature, unsophisticated relatively uneducated age bracket as the plaintiff Bruce R. Desmarais; that the pupils in said class, including the plaintiff Bruce R. Desmarais, had no choice as to their teacher, but were instead ordered to David H. Byron's class by the School Administration; that while in such class, they were subject to his custody, control and supervision; that David H. Byron, while any particular class was in his classroom, had the right and the duty to properly teach, supervise, control and discipline the members of the class, including the plaintiff Bruce R. Desmarais; that whereas he had the duty and obligation to teach said pupils chemistry, the specific manner and means in which he conducted his courses, subject to school rules and regulations, were within his sole proper discretion and control; that during said school year David H. Byron was aware of the fact that there was in force and effect a statute directing that during the conduct of any experiments wherein volatile or explosive chemicals were to be used, pupils and teachers were to wear safety glasses in order to avoid possible injuries to the eyes; that separate and apart from the statute, David H. Byron knew, or should have known, that if such experiments were to be ordered by him, in order to protect the pupils who were under his charge, direction and control, without any choice of their own, and who were bound to follow his instructions while in his classroom, should have made certain, as part of his duties, that each and every one of such pupils, including the plaintiff Bruce R. Desmarais, wore safety glasses during any potentially dangerous experiment; that during the school year in issue, David H. Byron, as was his right and duty, ordered pupils to conduct various experiments

which involved the use of volatile or explosive chemicals: that David H. Byron, prior to ordering the conduct of such experiments sometimes announced, as was his duty, that the pupils should wear the safety glasses which had been furnished and provided by the School Administration; that during the course of said school year David H. Byron learned that some of the pupils, including the plaintiff Bruce R. Desmarais did not always use safety glasses, when they should have, and that they would either not use them at all, or use them only a portion of the time; that on or about June 10, 1966, toward the end of the school year, David H. Byron, even though he realized and knew that some of the pupils, including the plaintiff Bruce R. Desmarais, might not wear safety glasses, ordered his pupils, including the plaintiff Bruce R. Desmarais, to conduct an experiment involving the use of especially volative or explosive chemicals, and he knew, or should have known, that the use of said chemicals involved an especially great risk of an explosion, which explosion could cause a serious injury to the eye or eyes of some of the pupils; that on the date in question the plaintiff Bruce R. Desmarais failed to wear safety glasses, while he was in a classroom which he was not in by his own choice, and while under the supervision and control of David H. Byron, dutifully conducted the experiment as ordered by David H. Byron; that during the conduct of said experiment, the chemicals exploded, through no fault of the plaintiff Bruce R. Desmarais, the chemicals entered one of his eyes and caused permanent loss of sight in that eye and also caused the plaintiff, Bruce R. Desmarais, to endure hospitalization, medical treatment, excrutiating pain and suffering, both mental and physical, which such pain, suffering and medical treatment have persisted from the date

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of the incident to the date of this declaration, and will probably continue for the rest of the plaintiff Bruce R. Desmarais' life; that whereas David H. Byron had the right to conduct his classes in any way he deemed correct, in his reasonable discretion, he had the duty to conduct them properly, bearing in mind that he had the custody, control and supervision of his pupils while in his classroom, through no choice of their own, and he had the particular duty to use reasonable care to see to the safety of such pupils from physical harm while under his care and supervision, to the extent which he could; that also bearing in mind that the experiment in question was largely dangerous, and bearing in mind that it was ordered close to the end of the school year in question, and bearing in mind that he knew or should have known by that time that some of his pupils, including the plaintiff Bruce R. Desmarais would probably fail to use safety glasses, and bearing in mind their tender, immature, unsophisticated relatively uneducated age bracket, and bearing in mind that this fact would greatly increase the danger of serious eye injury to the pupils, including the plaintiff Bruce R. Desmarais, who were then and there under his custody, control and supervision, David H. Byron nevertheless improperly ordered them to conduct the experiment; that under all of these circumstances, the positive act of David H. Byron in ordering the particular experiment at the particular time was an improper doing of an act (conducting a class) which David H. Byron might lawfully do, or, misfeasance; that as the result of David H. Byron's misfeasance, or as the result of his improper doing of the act of ordering the experiment, which order the plaintiff Bruce R. Desmarais was bound to follow, the plaintiff Bruce R. Desmarais suffered the injuries hereinbefore referred

to, and therefore the plaintiff Robert F. Desmarais, became obligated to pay for his son substantial medical expenses, all to his great damage as alleged in his writ.

BRUCE R. DESMARAIS
ROBERT F. DESMARAIS
By: Gerald F. Madaus
Their Attorney

FILED May 1, 1972

Defendant's Demurrer

Now comes the defendant, Wachusett Regional School District in the above entitled action and demurs to Counts III and IV of the plaintiffs' declaration and for reason assigns as follows:

1. That the said counts do not state concisely and with substantial certainty the substantive facts necessary to constitute a legal cause of action against this defendant.

2. That this defendant is not, as a matter of law, liable for the tortious conduct of its alleged servants, agents or employees, and as

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a consequence the said counts fail to state a cause of action against this defendant.

3. That this defendant is immune from tort liability under the doctrine of governmental immunity.

WACHUSETT REGIONAL SCHOOL DISTRICT
By its attorneys,
Mason, Crotty, Dunn & O'Connor

FILED May 18, 1972
June 15, 1972 Sustained with leave to amend denied. (Meagher, J.)

Now comes the defendant, David H. Byron in the above entitled action and demurs to Counts I and II of the plaintiffs' declaration and for reason assigns as follows:

1. That the matters contained in the said counts are insufficient in law to enable the plaintiffs to maintain this action.

2. That the said counts do not state concisely and with substantial certainty the substantive facts necessary to constitute a legal cause of action against this defendant.

3. That the defendant, David H. Byron was a public schoolteacher and was governed by the same limited powers, duties and standard of tort liability as a public officer.

4. That the defendant, David H. Byron was fully engaged in the performance of his public duties as a public school teacher.

DAVID H. BYRON
By his attorneys,
Mason, Crotty, Dunn & O'Connor

FILED May 18, 1972
June 15, 1972 Sustained, with leave to amend denied. (Meagher, J.)

Appendix C.

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth,
At Boston,

May 1, 1973.

IN THE CASE OF

BRUCE R. DESMARAIS, ET AL

v.

WACHUSETT REGIONAL SCHOOL DISTRICT, ET AL

pending in the Appeals Court

ORDERED, that the following entry be made in the docket; viz.,—

Petition for Further Appellate Review Denied.

By the Court,

Frederick J. Quinlan

FREDERICK J. QUINLAN, Clerk.

May 1, 1973.

Appendix D.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
No.

BRUCE R. DESMARAIS, ET AL.

vs.

WACHUSETT REGIONAL SCHOOL DISTRICT ET AL.

PLAINTIFFS' BRIEF IN OPPOSITION TO WACHUSETT REGIONAL SCHOOL DISTRICT'S DEMURRER

LAW

A regional school district has the same protection from liability as a town under the doctrine of governmental immunity since a regional school district by statute has been placed in the same position as a town for the purpose of lawsuits. G.L. Chap. 71, Sec. 16 (b).

A municipality is not liable for the act of public officers acting in the discharge of public duties. Molinari v. Boston, 333 M. 394, 395.

A municipality is not liable for negligent or tortious acts in the conduct of its schools. Hill v. Boston, 122 M. 344, 345.

A municipality is not liable for the misfeasance of public officers "performing duties strictly public" since "the doctrine respondeat superior does not apply to the servants of one who is acting only as a representative of the government, for the benefit of the public". Moynihan v. Todd, 188 M. 301, 304

ARGUMENT

The underlying contentions of the plaintiffs is first, that the doctrine of sovereign immunity violates equal protection of law because it establishes two categories of claimants, those offended by governmental action, with different protections, but without any foundation of reasonableness. Withholda remedy from persons injured by governmental torts but not private ones or from some persons but not others injured by government in tortious, but different, phases of its activity is the denial of equal justice which is prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Long ago in Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-374, in a case involving nationality discrimination, the test of equal protection in the administration of a law was delineated. The Court said, "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Much later in the case of Baker v. Carr, (1962), 369, U.S. 186, the Supreme Court of the United States gave a definition of a Court's function under the equal protection clause:

"it has been open to the Courts since the enactment of

the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."

The operation of the doctrine of sovereign immunity results in different consequences for injured persons in at least two ways. Persons victimized by private tortfeasors may be compensated for their damages. But so long as sovereign immunity is extant persons suffering damage through comparable fault on the part of a governmental unit may not recover unless the tortious action happens to be one within a specific exception, then two classes of persons injured by the state develop--those hurt in the course of the excepted activity and those not. Such circumstances raise the question whether such differences as those described mount arbitrary and unreasonable distinctions incompatible with the constitutional standard established by the equal protection clause.

The plaintiffs contend therefore that there is no rational policy for the distinctions created by the immunity. Further, that the distinctions so based are capricious and an arbitrary attempt to remove governmental responsibility without reason. The withholding of a remedy against the plaintiffs on these grounds is a denial of due process and fatally offends the Constitution.

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The second contention of the plaintiffs is that the doctrine of sovereign immunity is grossly incompatible with the rule of law. The notion that the government or its agents may irresponsibly maim a person contravenes the most elemental notions of justice and due process. In controversies between any powerful governmental body and a relatively feeble individual due process should not allow the contest to start with such a fatal impediment to the individual's case. Since the doctrine is essentially judge-made in this jurisdiction, it can and should be abolished by the same authority.

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Appendix E.

C. Second argument.

To hold that "public officers engaged wholly in the performance of public duties are liable only for their

own acts of misfeasance in connection with ministerial matters," Fulgoni v. Johnston, 302 Mass. 421, 423, infringes on a most fundamental requirement of due process found in the constitutions of the Commonwealth and the United States, at least insofar as this rule is held to apply to teachers in a public school system.

The ability of a person to seek redress in the courts is a fundamental right. Denying this right to the plaintiffs in this case, on a classification such as whether or not the defendant's conduct was misfeasant, is repugnant to justice and fairness. Had the plaintiff been a student privileged enough by income to attend a private school, he would not have been so invidiously discriminated against by the distinction which the present law seeks to enforce. Because the plaintiff was a public school student he should not thus become a member of a disadvantaged group, who is denied equal treatment before the court.

Certainly there is no compelling state interest which would require the continuance of such a discriminatory classification as deprives this plaintiff of his right to trial. The plaintiffs contend that there must be a

substantial justification shown by the state to justify denial of equal access to the courts to any of its subjects. Substantial justification cannot be shown here.

II. Re: the demurrer of Wachusett Regional School District.

A. Present law.

1. A regional school district has the same protection from liability as a town under the doctrine of governmental immunity, since a regional school district by statute has been placed in the same position as a town for the purpose of lawsuits. G.L. c. 71, sec. 16(b). Desmarais v. Wachusett Regional School District, Mass. Adv. Sh. (1971) 1763.

2. A municipality is not liable for the acts of public officers in the discharge of public duties. Molinari v. Boston, 333 Mass. 394, 395.

3. A municipality is not liable for negligent or tortious acts in the conduct of its schools. Hill v. Boston, 122 Mass. 344, 358.

4. A municipality is not liable for the misfeasance of public officers "performing duties strictly public" since "the doctrine respondeat superior does not apply to the servants of one who is acting only as a representative of the government, for the benefit of the public." Moynihan v. Todd, 188 Mass. 301, 304.

B. Constitutionality of present law.

1. The plaintiffs submit that the doctrine of sovereign immunity violates the constitutions of the Commonwealth of Massachusetts and the United States. The doctrine denies equal protection, violates due process and contravenes the most elemental notions of justice and fairness. The doctrine should be abolished.

2. The first contention of the plaintiffs is that the doctrine of sovereign immunity violates equal protection of the law because it establishes two categories of claimants, those injured by governmental action and those injured by private action. Each class has different protection, but without any foundation of reasonableness. Withholding a remedy from persons injured by governmental torts, but not private ones, or from some

persons, but not others injured by government in tortious, but different, phases of its activity is the denial of equal justice which is prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

3. In Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886), a case involving nationality discrimination, the test of equal protection in the administration of a law was delineated. The court said,

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Many years later in the case of Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court of the United States gave a definition of a court's function under the equal protection clause:

> "... it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." At 226.

4. The operation of the doctrine of sovereign immunity results in different consequences for injured persons in at least two ways. Persons victimized by private tortfeasors may be compensated for their damages. But so long as sovereign immunity is extant, persons suffering damage through comparable fault on the part of a governmental unit may not recover unless the tortious action happens to be one within a specific exception. Thus, two classes of persons injured by the sovereign develop--those hurt in the course of the excepted activity, and those not. Such circumstances raise the question whether such differences amount to arbitrary and unreasonable distinctions, incompatible with the constitutional standard established by the equal protection clause.

5. The plaintiffs contend that there is no rational policy for the distinctions created by the immunity. Further, they contend that the distinctions so based are capricious, and an arbitrary attempt to remove governmental responsibility without reason. The withholding of a remedy from the plaintiffs on these grounds is a denial of due process and fatally offends the Constitution.

6. The second contention of the plaintiffs is that the doctrine of sovereign immunity is grossly incompatible with the rule of law. The notion that the government or its agents may irresponsibly maim a person contravenes the most elemental notions of justice and due process. In controversies between any powerful governmental body and a relatively feeble individual, due process should not allow the contest to start with such a fatal impediment to the individuals' case. Since the doctrine is essentially judge-made in this jurisdiction, it can and should be abolished by the same authority.

To hold that the Wachusett Regional School District is not responsible for certain acts of its servants and employees unconstitutionally discriminates against the victims of municipal acts of negligence in violation of the equal protection provision of the United States Constitution. Where the agent of a municipality commits intrinsically the same negligent act as would justify recovery if committed by an agent of a private entity, and the law says unequally that the plaintiff may not recover

because he has been the unfortunate victim of the municipality, there is as much discrimination as if the victim's rights had been abrogated because of his race or nationality.

The plaintiff was compelled to attend school by the laws of this Commonwealth. If he was not so fortunate as to have financial means to attend a private school, the law should not deprive him of his basic constitutional rights of equal protection and due process simply because he was a member of a "disadvantaged" group who attended public school.

Appendix F.

B Plaintiffs assert that the doctrine that a public school teacher, as he is a public servant, is liable only for misfeasant, as opposed to non-feasant, conduct, is violative of the "due process" and "equal protection" clauses of the Massachusetts and United States Constitutions, and should be abolished. The Appeals Court did not meet this issue, and, therefore, further review is sought.

5. Argument

Plaintiffs assert that further review is warranted for two substantial reasons:

A In the interest of justice to the plaintiffs.

B Because the public interest is affected.

A - In the Interest of Justice

Here we have a plaintiff who, at a tender age, suffered a serious, painful and disabling injury - the permanent loss of the vision in an eye.

He has thusfar been denied the opportunity of having his case presented before a jury.

In the earlier Desmarais case, previously cited, this Court stated that "'public officers

engaged wholly in the performance of public duties are liable only for their own acts of misfeasance . . .'" Accepting that as the stated law of the Commonwealth, the plaintiffs assert that the declaration in the instant case alleges a positive act of misfeasance (ordering the experiment to be conducted) and is distinguishable in fact and in law from the declaration in the earlier case. Hence, the plaintiffs argue that their declaration in the instant case sets forth a cause of action, and they should have been allowed to try their case to a jury. Failure to allow that trial results in a substantial injustice to the plaintiffs, particularly bearing in mind the severity of the injury.

B - In the Public Interest

Plaintiffs assert that it is in the public interest to have a judicial determination as to whether or not the rule set forth in the earlier Desmarais case violates the "due process" and the "equal protection" clauses of the Massachusetts and United States Constitutions. This issue was not met by (nor, to the best of plaintiffs' memory and belief argued before) the Supreme Judicial Court in the earlier case. It was suggested to the Appeals Court when this case was argued before that Court,

but not met, insofar as a reading of its rescript opinion would indicate.

Plaintiffs urge that, at the very least, they are entitled to a deliberation of the issue on the following basis:

This Commonwealth has decreed by statute that all children (with certain exceptions) under age sixteen (16) must go to school. (Massachusetts General Laws, Chapter 76) It has also undertaken historically to provide and maintain free public school systems. (No citation required.) A child born to parents of means has the choice of attending a free state-financed public school, or, if his parents can pay, an accredited private school of his (or their) choice.

The poor and disadvantaged student has no such freedom of choice. Although it is mandated by statute that he must attend school, because of his accident of birth, he has no choice but to attend a public school.

Nevertheless, the highest court of this Commonwealth has decreed (in the earlier Desmarais case) separate but unequal treatment for this student - a public school teacher is liable only

for misfeasance. By inference, at least, a private school teacher would be liable to a private school student for ordinary negligence; the private school student would not have to engage in the tenuous and semantic task of trying to determine the difference (if any) between "misfeasance" and "nonfeasance." "A rose by any other name would smell as sweet."

Hence, the plaintiffs argue that the rule as stated in the earlier Desmarais case deprives these plaintiffs, and many others like them, of their constitutional rights to equal protection of the laws, and to due process of the law. This rule has made public school students second class citizens, without a showing of any substantial state reason for doing so.

In support of their argument, the plaintiffs cite the following cases: Brown vs. Board of Education, 347 U.S. 483; Skinner vs. Oklahoma, ex rel. Williamson, 316 U.S. 535, 541; ("When the law lays an unequal hand on those who have commited intrinsically the same quality of offense . . . it has made . . . an invidious . . . discrimination . . .") Reynolds vs. Sims, 377 U. S. 533; Alma vs. American Guarantee & Liability Insurance Company, 391 U.S. 73; King vs. Smith, 392 U.S. 309, 334;

Levy vs. Louisiana, 391 U.S. 68; Griffin vs. Illinois, 351 U.S. 12; Takahashi vs. Fish and Game Commission, 334 U.S. 410; Yick Wo vs. Hopkins, 118 U.S. 356; Reed vs. Reed, 404 U.S. 71; Baker vs. Carr, 369 U.S. 186; Douglas vs. California, 372 U.S. 353.

In summary, the plaintiffs argue that the question of tort liability, or immunity or limited immunity from tort liability vis-a-vis the public school student vs. the public school teacher, involves a serious and substantial question affecting the public interest, particularly from the standpoint of Federal and State Constitutional guarantees of equal protection of the laws, and the rights to due process of law, including especially the right to a jury trial. Since the Appeals Court failed to meet these questions, plaintiffs request that this Court do so, on the grounds that justice and the public interest so require.

Respectfully submitted,

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ROBERT F. DESMARAIS

By_____
Richard J. Sarapas, Their
Attorney